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BEFORE THE ARIZONA CORPORATION COMMISSION

28

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

In the matter of:

YUCATAN RESORTS, INC.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

YUCATAN RESORTS, S.A.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
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**RESORT HOLDINGS INTERNATIONAL,
INC.,**
3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
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DOCKET NO. S-03539A-03-0000

SECURITIES DIVISION'S RESPONSE
TO RESPONDENTS' JOINT MOTION
TO PRECLUDE THE TESTIMONY OF
MARCIA TAPLIN AND ALL EXHIBITS
RELATED THERETO OR, IN THE
ALTERNATIVE, TO COMPEL THE
PRODUCTION OF DOCUMENTS AND
STAY THE HEARING

AZ CORP COMMISSION
DOCUMENT CONTROL

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1 **WORLD PHANTASY TOURS, INC.,**)
 2 **a/k/a MAJESTY TRAVEL**)
 3 **a/k/a VIAJES MAJESTY**)
 4 Calle Eusebio A. Morales)
 5 Edificio Atlantida, P Baja)
 6 APDO, 8301 Zona 7 Panama,)
 7 **AVALON RESORTS, S.A.**)
 8 Av. Coba #82 Lote 10, 3er. Piso)
 9 Cancun, Q. Roo)
 10 Mexico C.P. 77500)
 11 **MICHAEL E. KELLY and LORY KELLY,**)
 12 husband and wife,)
 13 29294 Quinn Road)
 14 North Liberty, IN 46554;)
 15 3222 Mishawaka Avenue)
 16 South Bend, IN 46615;)
 17 P.O. Box 2661)
 18 South Bend, IN 46680,)
 19 Respondents.)

13 The Securities Division of the Arizona Corporation Commission ("Division") hereby
 14 responds to Respondents' Joint Motion to Preclude the Testimony of Marcia Taplin, and Preclude
 15 All Exhibits Related Thereto, Or in the Alternative, To Compel Production of Documents and Stay
 16 the Hearing ("Joint Motion"). This Joint Motion ultimately argues that the Division's expert
 17 accounting witness does not qualify as an expert or, alternatively, that a stay is required for the
 18 Respondents to conduct additional discovery. Both claims are unfounded.

19 Concerning the first issue, a determination as to whether Ms. Taplin qualifies as a forensic
 20 accounting expert is within the sole discretion of the Administrative Law Judge. Demanding that the
 21 Administrative Law Judge exercise that discretion using Respondents' cherry-picked facts prior to
 22 her appearance is entirely inappropriate at this preliminary juncture. Respondents' demand also runs
 23 directly counter to the Division's statutory authority to offer Division witnesses with specialized
 24 knowledge to evaluate the evidence of a case.

25 Respondents' second objection, that they require additional time for discovery prior to
 26 accountant Taplin's testimony, is now moot. The Division has provided Respondents with the

sought after discovery, and Taplin is now tentatively set to testify in December 2005, almost three months later than originally scheduled. Accordingly, Respondents' Joint Motion is based on claims that either lack merit and/or are no longer at issue. Under such circumstances, the Joint Motion must be denied.

MEMORANDUM OF POINTS & AUTHORITIES

DISCUSSION

I. Ms. Taplin will Qualify as a Forensic Accounting Expert at Hearing

There is no doubt that Division accounting witness Marica Taplin ("Taplin") has the experience and skill required to qualify as an forensic accounting expert during the administrative hearing in this matter. Taplin has advanced certifications, several years of forensic accounting experience, and specialized knowledge in Division investigative work. These qualifications will be elicited in due course during the introductory phase of her direct examination. Moreover, Taplin is explicitly entitled to utilize her technical skills to testify about the evidence in this administrative action under the Arizona Administrative Procedures Act. Her qualification as an expert is assured but need not be determined at this time.

A. *Accountant Taplin qualifies as an expert witness under the guidelines for expert testimony*

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training or education*, may testify thereto in the form of opinion or otherwise. *Arizona Rules of Evidence, Rule 702 (emphasis added)*. It is not necessary that an expert has the highest possible qualifications and degree of skill and knowledge in order to testify; an "expert" is one whose opinions are based on specialized knowledge acquired through experience or careful study which is unknown to people in general. *State v. Riggs*, 186 Ariz. 573 (App. 1996) *vacated on other grounds*, 189 Ariz. 327 (1997); *See also State v. Jessen*, 130 Ariz. 1 (1981); *Gaston v. Hunter*, 121 Ariz. 33 (App. 1978).

1 Superlative qualifications are not a prerequisite to testify as an expert about a particular
2 matter. The extent of training and experience goes to the weight, rather than the admissibility, of an
3 expert's testimony. *State v. Mosley*, 119 Ariz. 393 (1978); *State v. Lajeunesse*, 27 Ariz.App. 363
4 (1976). For example, the Arizona Supreme Court held that the testimony of a witness who had both
5 formal training and on-the-job training in the classification of fingerprints was admissible over
6 objections that the witness was not a qualified expert on fingerprints. The extent of the witness's
7 training went to the weight of his testimony and not to the admissibility of the evidence. *State v.*
8 *Pennye*, 104 Ariz. 146 (1969). *See also Wal-Mart v. Industrial Commission of Arizona*, 183 Ariz.
9 145 (App.1995)(administrative law judge did not err in allowing expert opinion of physician's
10 assistant who had examined claimant).

11 In this instance, testimony will be elicited to reflect that Taplin is an expert in forensic
12 accounting based on an extensive combination of education, knowledge, skill, and experience gained
13 over 7 years as a senior forensic accountant with the Division. Her specialized knowledge can
14 plainly aid the trier of fact in assessing the evidence, and it is readily apparent that her specialized
15 skill in forensic accounting is "unknown to people in general." Accordingly, she will readily qualify
16 as an expert; to what extent the presiding administrative law judge assigns weight to her testimony is
17 to be determined by the administrative law judge at the hearing.

18 ***B. The Division is authorized by statute to utilize the technical***
19 ***expertise and specialized knowledge to discuss and evaluate***
20 ***the evidence in administrative hearings***

21 The Arizona Administrative Procedures Act provides guidance with respect to the conduct of
22 administrative hearings. Among other things, these rules speak directly to the use of administrative
23 agency employees during the course of contested administrative hearings. Specifically, A.R.S. § 41-
24 1062(A)(3) provides, in part, "The agency's experience, technical competence and specialized
25 knowledge may be utilized *in the evaluation of evidence.*" *A.R.S §41-1062(A)(3)(emphasis added).*
26 The obvious import of this provision is that agency employees, using their specialized skills and

1 knowledge, can evaluate evidence on behalf of their own administrative agency and against
2 respondents in a contested action.

3 This provision is salient on still other grounds: the Administrative Procedures Act explicitly
4 recognizes that administrative agencies have employees with the technical competence and
5 specialized knowledge so as to provide the trier of fact assistance in the evaluation of evidence. This
6 is tantamount to a statutory acknowledgement that agencies employees can not only participate as
7 witnesses for their own agencies in contested hearings, but that these individuals can employ their
8 technical or specialized knowledge as experts.

9 In their Joint Motion, Respondents argue that not only does forensic accountant Taplin not
10 qualify as an expert, but that she must also be precluded from testifying because she is a "biased"
11 Division employee. The Arizona Administrative Procedures Act eviscerates these arguments
12 outright. Under the Arizona Administrative Procedures Act, Division forensic accountant Taplin is
13 not only authorized by statute to testify on behalf of the Division, but she can share her specialized
14 skill and knowledge in evaluating the evidence.

15 ***C. Respondents' demand to have Taplin's expert status determined***
16 ***using selective facts is unpersuasive and untimely***

17 As with essentially all other Division witnesses called during the course of this administrative
18 hearing, Respondents have filed a motion in an effort to suppress testimony and evidence. In this
19 instance, the Respondents are effectively asking the presiding administrative law judge to preclude a
20 witness from testifying based on their own estimation that she does not qualify as an expert witness.

21 Obviously, this assessment is not the Respondents to make. It lies within the discretion of the
22 presiding Administrative Law Judge to determine whether this witness could provide scientific,
23 technical, or other specialized knowledge to assist the trier of fact to understand the evidence or to
24 determine a fact in issue. *Arizona Rules of Evidence, Rule 702.* In view of the fact that this
25 particular witness - a CPA and senior forensic accountant with over seven years of forensic
26 accounting experience - has coded and analyzed the underlying financial data relating to this case for

1 over two years, it goes to reason that this witness could aid the trier of fact to understand the financial
2 evidence in this case.

3 Irrespective of this point, the presiding ALJ should at least have an opportunity to evaluate
4 this witness in person before exercising his discretion to recognize this Division witness as an expert.
5 Any preliminary determination based on Respondents' selective representations is entirely
6 inappropriate.

7 **II. Respondents' Attempt at Using Discovery Demands to Preclude or Delay**
8 **Witness Taplin's Testimony is No Longer Valid**

9 Respondents filed their Joint Motion to preclude Taplin on the morning of September 19,
10 2005, the first day this administrative hearing was scheduled to recommence. It had been
11 approximately 150 days since hearing had been continued due to conflicts in the schedules of
12 Respondents' counsel. In the Joint Motion, Respondents argue that, in addition to the expert
13 qualifications issue, witness Taplin must now be precluded from testifying, or alternatively, her
14 testimony must stay, in order to allow Respondents to conduct additional discovery.¹ This
15 untimely discovery demand has been rendered irrelevant in light of the fact that this entire discovery
16 dispute is now moot.

17 On the first day of hearing, the parties agreed to continue the testimony of Taplin for a
18 substantial period of time in order to explore other forms of resolution. In so doing, Respondents
19 were effectively granted a stay of at least another 75 days to prepare for witness Taplin. To the
20 extent the Joint Motion seeks a stay to allow Respondents to further prepare for Taplin's testimony,
21 they have now been afforded that extension.

22 Respondents' discovery issues have been rendered moot on additional grounds. The
23 Division, in accordance with the representations that it made during the course of the Taplin
24 deposition on September 12, 2005, and pursuant to the representations that it made during the course

25 ¹ Division forensic accountant Marcia Taplin was listed as an expert on the Division's witness list as
26 early as October 2004. The Respondents had been aware of her appearance at this hearing for at least 11
months, but chose to file their Joint Motion to preclude two days before her anticipated testimony.

1 of the hearing session on Monday, September 19, 2005, has now provided the Respondents with
2 another round of documentation and computer information.² These additional materials include
3 subpoena documents, newly obtained bank data, new investor memos, correspondence, faxes, e-
4 mails, and computer databases containing financial data relating to this case.

5 As a result, not only have the Respondents been afforded an effective three month stay in this
6 matter, but the discovery demands that made up the core of Respondents' request to preclude or stay
7 Taplin's testimony have now been satisfied. It follows that Respondents' attempt to preclude or stay
8 on grounds that additional time is needed to pursue discovery and/or to prepare for the testimony of
9 Taplin is now inappropriate; the basis for this demand no longer exists.

10 **III. Respondents' Evidentiary Protests are Unfounded**

11 As a final matter, Respondents suggest that Taplin be precluded from testifying, and that any
12 related exhibits be barred, because her testimony would constitute a form of hearsay. Such an
13 assertion lacks merit on multiple levels. On an evidentiary level, the testimony offered by Taplin
14 will be based on her personal analysis of financial information lawfully obtained through normal
15 channels from various banking institutions. The data she relied upon in developing her analysis
16 derived from simple banking records: these documents *were records of regularly conducted*
17 *business activity*. Under the Arizona Rules of Evidence, these records plainly fall within the well-
18 recognized hearsay exception for business records. *See Rule 803(6), Arizona Rules of Evidence*. In
19 other words, Taplin's testimony will not be violation of the hearsay rules.

20 Of course, the issue of hearsay exceptions carries far less importance in administrative
21 proceedings. It is well-accepted that, in the case of contested administrative hearings, probative
22 hearsay evidence is not precluded by the rules against hearsay. In fact, there is a consistent line of
23

24 ² Respondents repeated protestations about the Division's compliance with discovery mechanics is ironic
25 in view of the actual documents exchanged between the various parties. The Division has now produced
26 over 16 boxes of case-related documentation to the Respondents. Despite repeated efforts to acquire
information about the Respondents and their Arizona investor listings, Respondents have yet to produce a
single document to the Division.

1 Arizona case law addressing the issue of admitting hearsay evidence in the quasi-judicial domain
2 of administrative proceedings. In the matter of *Begay v. Arizona Dept. of Economic Security*, 128
3 Ariz. 407 (App. 1981), the court made it clear that hearsay was indeed admissible in
4 administrative hearings in Arizona, and that such evidence could be given probative weight.
5 *Begay*, 128 Ariz. at 409. This court further noted that, under certain circumstances, hearsay could
6 be the sole support of an administrative decision. *Id.* at 410.

7 This decision was affirmed more recently in *Brown v. Arizona Dept. of Real Estate*, 181
8 Ariz. 320 (App. 1995). In *Brown*, the court held that section ARS §41-1062(A)(1) "clearly stated
9 that the rules of evidence required at judicial proceedings are not applicable in an administrative
10 proceeding," adding that hearsay evidence could be readily considered and given probative weight.
11 *Brown*, 181 Ariz. at 328. The court continued that Arizona cases addressing the use of hearsay
12 evidence in administrative hearings focus only on the reliability of the evidence, and that hearsay
13 evidence is considered reliable when circumstances establish that it is trustworthy. *Id.* The court
14 concluded by affirming the admissibility of the hearsay evidence in that case. *See also Galaz v.*
15 *Moore*, 20 Ariz.App 102 (1973)(admission of hearsay evidence by administrative judge was
16 proper).

17 The policy with respect to hearsay evidence is again addressed in the Corporation Rules of
18 Practice and Procedure. Under R14-3-109(K), the procedural rules state that in conducting any
19 hearing, neither the commission nor any officer or employee thereof shall be bound by the technical
20 rules of evidence, and no informality in any proceeding or in the manner of taking testimony shall
21 invalidate any order, decision, rule or regulation made, approved, or confirmed by the commission.

22 In short, the principal reason for disregarding hearsay objections in administrative
23 proceedings is the simple fact that the primary function of administrative proceedings is to assess
24 probative value, not admissibility. This is particularly true in light of the fact that the trier of fact in
25 an administrative hearing is presumed to have a specialized knowledge and expertise of the subject
26 matter that underlies the actions that come before that body. As such, administrative law judges are

1 not going to be influenced by the kinds of evidence that might otherwise be barred from a judicial
2 proceeding for fear of improperly swaying a lay jury.

3 Accordingly, Respondents' request to preclude Taplin's testimony and Taplin's exhibits on
4 the grounds of hearsay is groundless as a matter of law on two fronts. In the first instance, such
5 testimony will not constitute hearsay. In the second instance, even if the testimony of Taplin was
6 deemed to constitute hearsay, that determination would not preclude her testimony in this forum.
7 In both cases, Respondents' hearsay argument fails.

8 **CONCLUSION**

9 Respondents' Joint Motion to preclude still another witness rests on lacking arguments: that
10 the witness is not an expert and that further discovery requires her preclusion or a stay of the
11 proceedings. The former argument fails to recognize the prerequisites necessary to qualify as an
12 expert; the latter argument is moot. It follows that Respondents' Joint Motion should be denied.

13 RESPECTFULLY SUBMITTED this 17th day of October, 2005.

14
15 By: 

16 Jamie B. Palfai

17 Attorney for the Securities Division of the
18 Arizona Corporation Commission
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22 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
23 filed this 17 day of October, 2005, with

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25 Arizona Corporation Commission
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